Supreme Court, U.S.
FILED

001514 MAR 30 2001

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

Lance Raygor and James Goodchild,
Petitioners,

v.

Regents of the University of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF *CERTIORARI*

HOWARD L. BOLTER
Counsel of Record
Borkon, Ramstead, Mariani,
Fishman & Carp, Ltd.
485 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-7155

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

75 pp

QUESTION PRESENTED

Is the tolling provision of 28 U.S.C. §1367(d), insofar as it applies to a state defendant, unconstitutional?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT UNDER RULE 29.4(b) 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998) 12

Ballou v. University of Kansas Medical Center, 871 F.Supp. 1384 (D.Kan. 1994) 11

Blinn v. Florida Department of Transportation, __So.2d__, 2000 WL 1880213 (Fla. App. 1 Dist.) 10

Butler v. New York State Department of Law, 211 F.3d 739 (2d Cir. 2000) 12

Cipolla v. Arizona Department of Economic Secuirty, 57 F.3d 1076 (9th Cir. 1995) 11

Clearwater v. Independent School District No. 166, 231 F.3d 1122 (8th Cir. 2000) 12

Commack Self-Service Kosher Meats, Inc. v. State of New York, 954 F.Supp. 65 (E.D.N.Y. 1997) 12

Cooley v. Mississippi Department of Transportation, 96 F.Supp.2d 565 (S.D.Miss. 2000) 12

Doran by and through Doran v. Condon, 983 F.Supp. 886 (D.Neb. 1997) 11

Estate of Fennell v. Stephenson, 528 S.E. 2d 911 (N.C.App. 2000) 10

Felder v. Casey, 487 U.S. 131 (1988) 9

Haley v. Virginia Com. University, 948 F.Supp. 573 (E.D.Va. 1996) 12

Heck v. Humphrey, 512 U.S. 477 (1994) 9

Hiefner v. University of Tennessee, 914 F.Supp. 1513 (E.D.Tenn. 1995) 11

Kenney v. Hawaii, 109 F.Supp.2d 1271 (D.Haw. 2000) 11

Key v. Doyle, 434 U.S. 59 (1978) 8

Kimel v. Florida Board of Regents, 120 S.Ct. 631 (2000) 4, 8

Kimel v. Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998) *cert. granted*, 119 S.Ct. 902 (1999) 4

Lansing Mercy Ambulance Service v. Tri-County Emergency Medical Control Authority, Inc., 893 F.Supp. 1337 (W.D.Mich. 1995) 11

Legal Services Corporation v. Velazquez, 121 S.Ct. 1043 (2001) 8

Lembach v. State of Indiana, 987 F.Supp. 1095 (N.D.Ind. 1997) 11

Loren v. State of New York, 99 F.3d 402 (2d Cir. 1995) 11

McCabe v. Independent School District No. 625, 221 F.3d 1343 (8th Cir. 2000) 12

Meachem v. Wing, 77 F.Supp.2d 431 (S.D.N.Y. 1999)..... 11

Mercer v. Duke University, 190 F.3d 643 (4th Cir. 1999).... 12

Mitchell v. Helms, 530 U.S. 793 (2000) 8

Novosad v. State of New Mexico, 145 F.3d 1346 (10th Cir. 1998) 11

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)..... 8

Petitti v. Commission of Massachusetts Department of Mental Health, 859 F.Supp. 33 (D.Mass. 1993)..... 12

Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250 (3d Cir. 1994)..... 11

Ramirez v. Oklahoma Department of Mental Health, 41 F.3d 584 (10th Cir. 1994) 11

Raygor v. University of Minnesota, 604 N.W.2d 101(Minn. Ct. App.2000) 1

Regents of the University of Minnesota v. Lance Raygor and James Goodchild, 620 N.W.2d 680 (Minn.2001) 1

Reno v. Condon, 528 U.S. 141 (2000)..... 8

Repp v. Oregon Health Sciences University, 972 F.Supp. 546 (D.Or. 1997)..... 12

Richardson v. Southern University, 118 F.3d 450 (5th Cir. 1997) 11

Rossomando v. Board of Regents of University of Nebraska, 2 F.Supp.2d 1223 (D.Neb. 1998) 11

Sanders v. Miller, 837 F.Supp. 1106 (N.D.Ala. 1992) .....

Sherwinski v. Peterson, 98 F.3d 849 (5th Cir. 1996)..... 11

Sims v. Kernan, 29 F.Supp.2d 952 (N.D.Ind. 1998)..... 11

Snodderly v. Kansas, 79 F.Supp.2d 1241 (D.Kan. 1999)..... 11

Stevens v. Arco Management, 751 A. 2d 995 (D.C. Ct. App. 2000) 7

Tennant v. State of Florida, 111 F.Supp.2d 1326 (S.D. Fla. 2000)..... 11

United Mine Workers v. Gibbs, 383 U.S. 715 (1966)..... 6

United States v. Butler, 297 U.S. 1 (1936) 8

United States v. Gainey, 380 U.S. 63 (1965)..... 8

United States v. Morrison, 529 U.S. 598 (2000) 8

U.S. ex Rel. Moore v. University of Michigan, 860 F.Supp. 400 (E.D.Mich. 1994)..... 12

Walter v. Division of Revenue for State of Delaware, 961 F.Supp. 97 (D.Del: 1997) 11

White v. State of Alaska, 46 F.3d 1149 (9th Cir. 1995) 11

Younger v. Harris, 401 U.S. 37 (1971) 9

STATUTES

28 U.S. C. §1367 ..... *passim*

28 U.S.C. § 2403 ..... 3, 9

28 U.S.C. §1257(a) 1

Minn.Stat. §363.01, et seq. 3

LAW REVIEWS AND OTHER AUTHORITIES

S. Scott, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 Or. L. Rev. 695 (1993) 7

RULES

Federal Rule of Appellate Procedure 44 9

Federal Rule of Civil Procedure 12(b)(1) 4

Rules of the Supreme Court of the United States 29.4(b) 3

TREATISES

R. Stern & E. Gressman, Supreme Court Practice (1993) 8

CONSTITUTIONAL PROVISIONS

Amendment XI 1

Petitioners Lance Raygor and James Goodchild, respectfully petition for a writ of certiorari to review the decision of the Minnesota Supreme Court.

OPINIONS BELOW

The Minnesota Supreme Court's opinion in *Regents of the University of Minnesota v. Lance Raygor and James Goodchild* was filed January 4, 2001 and is reported at 620 N.W.2d 680 (Minn.2001). Appendix ["App"] A1-A15. The opinion of the Minnesota Court of Appeals in *Raygor v. University of Minnesota* was filed January 11, 2000 and is reported at 604 N.W.2d 121 (Minn.Ct.App. 2000). App A16-A26. The decision of the Hennepin County District Court of Minnesota was entered on June 29, 1999 and was unreported. App A27-A38. The decision of the United States District for the District of Minnesota was filed on July 11, 1997 and was unreported. App A39.

JURISDICTION

The Minnesota Supreme Court filed its decision on January 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States - Amendment XI

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Supplemental Jurisdiction - 28 U.S.C. §1367

Section 1367 provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims within the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

***

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

***

(3) The district court has dismissed all claims over which it has original jurisdiction.

***

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof, is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

STATEMENT OF THE CASE[1]

On or about August 23, 1995, Petitioners filed charges of discrimination with the Minnesota Department of Human Rights ("MDHR"). App A 43-A44. Both Petitioners alleged age discrimination in violation of the Minnesota Human Rights Act ("MHRA"), Minn.Stat. §363.01, *et seq.* arising out of Respondent's adverse actions taken against them on and after December, 1994. App A45. On July 17, 1996, the MDHR dismissed Petitioners' charges of discrimination. The MDHR issued letters of dismissal to Petitioners that outlined their rights to bring civil actions under the MHRA within 45 days of receipt of such letter. App. A46.

On or about August 30, 1996, Petitioners timely commenced separate actions against Respondent in the United States District Court for the District of Minnesota. App A41. Each Petitioner alleged one claim of age discrimination under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621-634 and one

[1] The underlying facts of the present case are undisputed. The Minnesota Trial Court, Minnesota Court of Appeals and Minnesota Supreme Court relied upon the facts set forth in the Affidavit of Matthew E. Johnson, filed with Respondents' initial Motion for Summary Judgment before the Minnesota Trial Court. The Affidavit of Matthew E. Johnson is attached to Petitioners' Appendix at App A40-A55 (excluding Exhibits 2 and 4 as duplicative, 5, 6 and 8 as unnecessary).

claim of age discrimination under the MHRA. The two actions were subsequently consolidated. App A45-A49.

On June 3, 1997, after nine months of litigation, Respondent filed a motion to dismiss Petitioners' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1). Respondent argued the federal district court lacked subject matter jurisdiction over Respondents' ADEA and MHRA claims on the grounds of Eleventh Amendment sovereign immunity. On July 11, 1997, the federal district court granted Respondent's Motion to Dismiss, without prejudice as to Petitioners' state claims. App A50.

Petitioners timely filed a joint notice of appeal from the federal district court's decision dismissing their ADEA claims. App A51-A52. The appeal was held in abeyance in the United States Court of Appeals for the Eighth Circuit pending this Court's decision in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998) *cert. granted*, 119 S.Ct. 902 (1999). After this Court issued its decision in *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000) Petitioners moved to withdraw their Eighth Circuit Appeal. Petitioners' motion was granted and the Eighth Circuit dismissed the appeal on January 26, 2000.

In the meantime, on or about July 31, 1997, even prior to filing their notice of appeal with the Eighth Circuit, Petitioners moved to preserve their state law age discrimination claims by filing a complaint under the MHRA in Hennepin County District Court. App A42. Initially, Petitioners' state law action was stayed pending the outcome of *Kimel*. Eventually, however, the stay was lifted only to allow Respondent to bring a Motion for Summary Judgment on statute of limitations grounds. App. A53-A55. Petitioners opposed the motion on the grounds that the state statute of limitations was tolled while the state claim was pending in federal district court pursuant to 28 U.S.C. §1367(d), and in

the alternative, the claim was equitably tolled.[2]

On May 28, 1999, the Hennepin County district court granted summary judgment concluding that:

> [T]he [Section 1367(d)] tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction." The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed [Petitioners'] state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

App A31.

Petitioners appealed the Hennepin County District Court decision to the Minnesota Court of Appeals. On January 11, 2000, the Minnesota Court of Appeals reversed the Hennepin County District Court. The Court of Appeals held that assertion of the Eleventh Amendment defense did not vitiate or destroy a federal court's original jurisdiction over claims involving federal questions, or the court's supplemental jurisdiction over state law claims under 28 U.S.C. §1367, until is was successfully asserted by a state entity. App A17. Moreover, the Minnesota Court of Appeals held that the statute of limitations governing Petitioners' state age

---

[2] Petitioners are not requesting review of the decision concerning equitable tolling. Thus, references to equitable tolling in any decision will not be discussed.

discrimination claim was tolled during the pendency of the federal district court action under 28 U.S.C. §1367(d). App A17.

On March 28, 2000, the Minnesota Supreme Court granted Respondent's Petition for Review of the Minnesota Court of Appeals' decision. On January 4, 2001, the Minnesota Supreme Court reversed the Minnesota Court of Appeals' decision. The Minnesota Supreme Court held that "*the application of Section 1367(d) is an unconstitutional infringement on state's sovereign immunity in violation of the Eleventh Amendment of the United States Constitution.*" App A2 (emphasis provided).

REASONS FOR GRANTING THE WRIT

This case presents two circumstances which ordinarily warrant review by this Court--a federal statute has been declared unconstitutional, and that declaration has been issued by a state court. Because the particular statute at issue, 28 U.S.C. § 1367, plays a pivotal role in coordinating proceedings in federal and state courts, a definitive decision by this Court regarding the constitutional question presented is of especial importance.

The tolling provision of section 1367(d) was enacted in 1990 to address a recurring and vexing problem in the relationship between federal and state courts. Where in a federal action involving federal question jurisdiction a plaintiff also raises supplemental (formerly "pendant") state claims, those state claims will usually be dismissed without prejudice if the federal claims are rejected prior to trial. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). During the pendency of that federal proceeding, the state statute of limitations will often have run, creating uncertainty as to whether the dismissed supplemental state claims could indeed be refiled in state court. Section 1367(d) resolved that issue

by providing that, following the federal court dismissal of such state claims, the plaintiff shall have at least 30 days to refile in state court.

This tolling provision serves the shared interests of the federal and state courts in the efficient administration of justice. "[I]t is generally desirable to toll the statute of limitations to permit refiling in the proper forum. Otherwise, parties could be manipulative in raising subject matter jurisdiction problems, and parties might feel compelled to file concurrent actions in state court if they suspect potential jurisdictional problems." *Stevens v. Arco Management*, 751 A. 2d 995, 1002 (D.C. Ct. App. 2000). This coordination of the interrelationship between the initial and later proceedings is of particular importance in our federal system.

> Tolling state statute of limitations periods serves two important functions to federal jurisdiction: (1) by guaranteeing a plaintiff that discretionary dismissal will not bar pendent state law claims, the statute assures the federal court that the entire case properly within its jurisdiction will be brought before it initially, rather than being brought in two forums, bifurcated; and (2) by providing some level of comfort to federal judges that discretionary dismissal will not subsequently bar a plaintiff's meritorious state law claims, the tolling provision serves the federal court case load and allows the judge to dismiss the claim without concern.

S. Scott, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 Or. L. Rev. 695, 716 n. 145 (1993).

The court below has declared section 1367(d) unconstitutional as applied to state law claims against state defendants; under that court's reasoning, the statute would also be unconstitutional as applied to injunctive actions

against state officials. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Certiorari is ordinarily granted by this Court "to review the exercise of the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965); *see United States v. Butler*, 297 U.S. 1 (1936). "Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case." R. Stern & E. Gressman, Supreme Court Practice, 185 (1993).

Where a lower court has declared a federal statute unconstitutional, this Court regularly grants certiorari. *E.g., Legal Services Corporation v. Velazquez*, 121 S.Ct. 1043 (2001)(Legal Services Corporation Act held unconstitutional by lower court); *Mitchell v. Helms*, 530 U.S. 793 (2000)(chapter 2 of Education Consolidation and Impact Act of 1981 held unconstitutional by lower court); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)(application of ADEA to state defendants held unconstitutional by lower court); *United States v. Morrison*, 529 U.S. 598 (2000)(Violence Against Women Act held unconstitutional by lower court); *Reno v. Condon*, 528 U.S. 141 (2000)(Driver's Privacy Protection Act held unconstitutional by lower court).

Review by this Court is particularly appropriate where the decision against the constitutionality of a federal statute has been issued by a state court. Such state court decisions "threate[n] the supremacy of federal law." *Key v. Doyle*, 434 U.S. 59, 67 (1978). Prior to 1988, section 1257 authorized an appeal as of right to this Court in such cases. In 1988 Congress this Court's appellate jurisdiction was largely replaced by review on certiorari, to avoid burdening the Court with the often unimportant or uncontroversial issues that until then had been the subject of appeals. *See* H.R. Rep. 100-660, pp. 27-28 (Letter signed by all members of this Court). But just as resolution of state law questions remains the ultimate

responsibility of state courts, a determination of the validity of federal statutes under the federal constitution lies at the very core of this Court's role in the national government. That is particularly true where, as here, the constitutional question is one which is not likely ever to arise in, or be addressed by, the federal courts of appeals. Because disputes about the validity of the section 1367(d) tolling provision cannot arise except in state court, this Court is the only federal court in a position to consider that question.

The dispute about the validity of section 1367(d) raises federalism issues with which this Court has long been uniquely concerned. The existence of federal and state law claims arising out of a single occurrence often raises delicate problems about the relationship between federal and state courts. In a long line of decisions this Court has constructed a careful balance between the sometimes competing interests of those court systems. *E.g. Younger v. Harris*, 401 U.S. 37 (1971), *Heck v. Humphrey*, 512 U.S. 477 (1994); *Felder v. Casey*, 487 U.S. 131 (1988). Section 1367(d), like the Anti-Injunction Act and the detailed new provisions regarding habeas corpus, is an important component of the effort of Congress to coordinate the litigation of interrelated federal and state claims. This element of judicial federalism should not be struck down without plenary review by this Court.

Where a federal statute has been declared invalid by a state court, review by this Court is particularly appropriate because the state court proceedings lack a critical safeguard ordinarily present where such a weighty constitutional issue is in dispute. Since 1937 Congress has required that *federal* courts formally notify the Attorney General whenever the validity of a federal statute is challenged in a proceeding to which the United States is not a party, and permit the United States to intervene to defend the law. 28 U.S.C. § 2403. That provision is implemented by Rule 44 of the Federal Rules of Appellate Procedure. But because it is quite uncommon for

disputes about the constitutionality of federal statutes to arise in state court, section 2403 does not apply in such cases. Here, the constitutionality of section 1367(d) was raised for the first time in the Minnesota Supreme Court. Thus, in the instant case the Attorney General had no notice or knowledge of the attack on the validity of section 1367(d), and played no role in the proceedings below.

Until the decision of the court below, the validity of section 1367(d) has been largely unquestioned. On the two other occasions when the constitutionality of section 1367(d) was challenged in state courts, the statute has been upheld. In *Estate of Fennell v. Stephenson*, 528 S.E. 2d 911 (N.C.App. 2000), the Attorney General of North Carolina attacked the validity of the section 1367(d) tolling provision. In sustaining section 1367, the North Carolina court reasoned:

> [W]e must determine whether Congress had authority under the United States Constitution to enact the statute. . . . When Congress enacts a statute creating a rule of practice in the federal courts and that statute conflicts with a state provision, the federal provision governs. . . . The tolling of a statute of limitations is a regulation of "the judicial process," and therefore, is procedural. Accordingly, Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact section 1367(d).

528 S.E. 2d at 915. Florida courts have rejected a similar attack on section 1367(d) by the Attorney General of that state. *Blinn v. Florida Department of Transportation*, ___So.2d___, 2000 WL 1880213, *4-*5 (Fla. App. 1 Dist.):

> [I]t is apparent that section 1367(d) falls within the realm of conflict preemption. Here, the state statute

> of limitations stands as an obstacle to the accomplishment of the Congressional purpose to permit federal litigants to pursue their dismissed state law claims in state court, provided they do so within the thirty-day period provided in section 1367(d).

But see id. at *5 (Joanos, J., dissenting)(section 1367(d) invalid as applied to state law claims against *any* defendant.)

The decision below is of great practical importance. Pendant claims against state defendants are common in federal civil litigation, and arise in a wide variety of circumstances, which include claims for due process violations[3], Eighth Amendment violations[4], 42 U.S.C. §1983[5], Title VII of the Civil Rights Act of 1964[6], Americans

[3] *See Loren v. State of New York*, 99 F.3d 402 (2d Cir. 1995); *Lansing Mercy Ambulance Service v. Tri-County Emergency Medical Control Authority, Inc.*, 893 F.Supp. 1337 (W.D.Mich. 1995); *Rossomando v. Board of Regents of University of Nebraska*, 2 F.Supp.2d 1223 (D.Neb. 1998).

[4] *See Sherwinski v. Peterson*, 98 F.3d 849 (5th Cir. 1996).

[5] *Cipolla v. Arizona Department of Economic Security*, 57 F.3d 1076 (9th Cir. 1995); *White v. State of Alaska*, 46 F.3d 1149 (9th Cir. 1995); *Ramirez v. Oklahoma Department of Mental Health*, 41 F.3d 584 (10th Cir. 1994); *Novosad v. State of New Mexico*, 145 F.3d 1346 (10th Cir. 1998); *Richardson v. Southern University*, 118 F.3d 450 (5th Cir. 1997); *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250 (3d Cir. 1994); *Tennant v. State of Florida*, 111 F.Supp.2d 1326 (S.D. Fla. 2000); *Kenney v. Hawaii*, 109 F.Supp.2d 1271 (D.Haw. 2000); *Hiefner v. University of Tennessee*, 914 F.Supp. 1513 (E.D.Tenn. 1995); *Meachem v. Wing*, 77 F.Supp.2d 431 (S.D.NY. 1999); *Sims v. Kernan*, 29 F.Supp.2d 952 (N.D.Ind. 1998); *Lembach v. State of Indiana*, 987 F.Supp. 1095 (N.D.Ind. 1997); *Doran by and through Doran v. Condon*, 983 F.Supp. 886 (D.Neb. 1997);); *Walter v. Division of Revenue for State of Delaware*, 961 F.Supp. 97 (D.Del. 1997).

[6] *Snodderly v. Kansas*, 79 F.Supp.2d 1241 (D.Kan. 1999); *Ballou v. University of Kansas Medical Center*, 871 F.Supp. 1384 (D.Kan. 1994);

with Disabilities Act[7], Age Discrimination in Employment Act [8], Title IX[9], Religious Freedom Act[10], and the False Claims Act[11]. So long as the underlying federal claim is still pending, state defendants often do not object to the inclusion of these state law claims--even if an Eleventh Amendment objection might be available--because dismissal of those state claims by the federal court would simply lead the plaintiff to file a second, simultaneous state court action. In the absence of the section 1367(d) tolling provision, however, state defendants would have every reason to wait until the state court limitations period had expired, and then for the first time object to federal court consideration of the state claim.

The decision below will inexorably compel plaintiffs with both federal and state claims against state defendants to take the precaution of now commencing separate but concurrent civil actions in both federal and state court. Absent a definitive decision by this Court, no civil litigant can any longer be confident that he or she will be able to invoke

---

Petitti v. Commission of Massachusetts Department of Mental Health, 859 F.Supp. 33 (D.Mass. 1993); *Clearwater v. Independent School District No. 166*, 231 F.3d 1122 (8th Cir. 2000).

[7] *Repp v. Oregon Health Sciences University*, 972 F.Supp. 546 (D.Or. 1997); *Cooley v. Mississippi Department of Transportation*, 96 F.Supp.2d 565 (S.D.Miss. 2000); *McCabe v. Independent School District No. 625*, 221 F.3d 1343 (8th Cir. 2000); *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998).

[8] *Butler v. New York State Department of Law*, 211 F.3d 739 (2d Cir. 2000).

[9] *Haley v. Virginia Com. University*, 948 F.Supp. 573 (E.D.Va. 1996); *Mercer v. Duke University*, 190 F.3d 643 (4th Cir. 1999).

[10] *Commack Self-Service Kosher Meats, Inc. v. State of New York*, 954 F.Supp. 65 (E.D.N.Y. 1997).

[11] *U.S. ex Rel. Moore v. University of Michigan*, 860 F.Supp. 400 (E.D.Mich. 1994).

section 1367(d) if a pendant claim is dismissed. That precaution, in turn, will often lead to vexing problems regarding *res judicata* and application of the *Rooker-Feldman* doctrine. At the least, confusion and a waste of judicial resources will invariably follow. Review by this Court is necessary to avoid these problems.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HOWARD L. BOLTER
Counsel of Record
Borkon, Ramstead, Mariani,
Fishman & Carp, Ltd.
485 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-7155

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioners

Dated: March 29, 2001

STATE OF MINNESOTA

IN SUPREME COURT

C1-99-1140

Court of Appeals — Blatz, C.J.
Took No Part, Page, J.

Regents of the University of Minnesota,

Appellant,

vs.

Filed: January 4, 2001
Office of Appellate Courts

Lance Raygor and James Goodchild,

Respondents.

SYLLABUS

1. The application of Section 1367(d) of Title 28 of the United States Code to toll the statute of limitations for filing a state law claim against an unconsenting state defendant is a denigration of the state's sovereign immunity barred by the Eleventh Amendment of the United States Constitution.

2. The district court did not abuse its discretion in finding that the statute of limitations does not toll on equitable principles where the parties knew that the Eleventh Amendment, if asserted by the University, would bar the federal district court from exercising supplemental jurisdiction over the state law claims, and the district court did not find any other grounds sufficient to invoke the limited remedy of equitable tolling.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

BLATZ, Chief Justice.

This case raises the issue of whether the tolling provision of the federal supplemental jurisdiction statute, codified at 28 U.S.C. § 1367(d) (1993), applies to toll the statute of limitations for Minnesota Human Rights Act claims against the Regents of the University of Minnesota during the time the state law claims were pending in federal court. Respondents Lance Raygor and James Goodchild brought this action against appellant Regents of the University of Minnesota (University) alleging age discrimination in violation of the Minnesota Human Rights Act (MHRA). The University brought a motion to dismiss, arguing that the statute of limitations for the MHRA claims had expired. In granting the motion, the state district court found that the statute of limitations for respondents' MHRA claims was not tolled under the federal supplemental jurisdiction statute and that equitable tolling did not apply to the facts in this case; therefore, the claims were not timely. The Minnesota Court of Appeals reversed, concluding that section 1367(d) did toll the state statute of limitations and that, in the alternative, the MHRA claims were equitably tolled during the pendency of the federal district court action. We reverse, holding that the application of section 1367(d) in this case is an unconstitutional infringement on state sovereign immunity in violation of the Eleventh Amendment of the United States Constitution, and that the district court did not abuse its discretion in concluding that equitable tolling does not apply.

In August 1995, respondents filed charges of discrimination with the Minnesota Department of Human Rights alleging age discrimination by the University of

Minnesota in certain employment decisions. The department dismissed the claims on July 17, 1996, and advised each respondent by letter that he could bring a civil action against the University in state district court within 45 days of receipt of the letter. Rather than filing in state court, respondents filed separate actions in the federal district court for the District of Minnesota on or about August 29, 1996, alleging violations of the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1999), and the Minnesota Human Rights Act, Minn. Stat. ch. 363 (2000). In its answers, the University raised Eleventh Amendment immunity and lack of jurisdiction as affirmative defenses. The federal actions were consolidated. In June 1997, the University served and filed a motion to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the Eleventh Amendment bars suits in federal court against a state by citizens of that or another state. The federal district court granted the motion by order filed July 14, 1997, dismissing the claims without prejudice. Respondents appealed the federal district court's decision to the Eighth Circuit Court of Appeals. The appeal was stayed. On January 11, 2000, the United States Supreme Court held in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), that the Eleventh Amendment is a valid defense to an Age Discrimination in Employment Act claim against a state. After *Kimel* was decided, respondents moved to withdraw the appeal, and the Eighth Circuit Court of Appeals dismissed the appeal.

Meanwhile, on August 1, 1997, respondents commenced this action in state district court alleging age discrimination under the MHRA. The action was stayed while the federal appeal was still pending; however, the stay was lifted on December 31, 1998, for the limited purpose of deciding the University's summary judgment motion. In moving for summary judgment, the University claimed that the action was barred by the state statute of limitations because respondents failed to file their claims in state district court

within 45 days of receiving notice that the Minnesota Human Rights Department had dismissed the claims. *See* Minn. Stat. §§ 363.06, subd. 3, 363.14, subd. 1(a)(1) (2000). The state district court granted the motion,[1] concluding that the limitations period for the state action was not tolled while the federal action was pending and that equitable tolling did not apply to extend the limitations period.

Respondents sought review of the state district court's judgment in the court of appeals. The court of appeals reversed, concluding that 28 U.S.C. § 1367(d) tolled the statute of limitations for respondents' MHRA claims during the pendency of the federal district court action. *See Raygor v. University of Minn.*, 604 N.W.2d 128, 133 (Minn. App. 2000). Alternatively, the court of appeals concluded that respondents' claims were equitably tolled while their federal district court action was pending. *See id.* at 134.

I.

This case presents us with the question of whether the tolling provision of the federal supplemental jurisdiction statute should apply to toll the statute of limitations for a state law claim against a state defendant, in light of the immunity afforded the state by the Eleventh Amendment. In consideration of this issue, we first review the supplemental jurisdiction statute and the Eleventh Amendment.

In *United Mine Workers v. Gibbs*, the United States Supreme Court recognized the common law doctrine of pendent jurisdiction, which permits a federal court to hear state law claims over which the federal court would not otherwise have jurisdiction when the state law claims are joined with a related federal claim. 383 U.S. 715, 725 (1966).

[1] The University brought the motion as a motion for summary judgment; however, the state district court's May 28, 1999, order and memorandum granted the motion as a motion to dismiss.

To be related for purposes of pendent jurisdiction, the claims "must derive from a common nucleus of operative fact." *Id.* Congress codified the doctrine of pendent jurisdiction at 28 U.S.C. § 1367, known as the supplemental jurisdiction statute. Subdivision (a) provides:

> Except as provided in subsections (b) [dealing with diversity jurisdiction] and (c) [discretionary dismissal of supplemental claims] or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (1993).

At issue in this case is subdivision (d) of section 1367, which tolls the state statute of limitations for claims asserted under supplemental jurisdiction while the claims are pending in federal court. Subdivision (d) also assures a 30-day period in which to bring a state action after a supplemental claim is dismissed by the federal court:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d). By its plain language, section 1367(d) applies to "any claim" asserted under section 1367(a); however, the University argues that this federal statute cannot trump the protections afforded the University by the Eleventh Amendment.

Critical to our analysis of section 1367(d)'s effect in this case is an understanding of the Eleventh Amendment. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Notwithstanding this express language, the Eleventh Amendment has long been interpreted to also prohibit citizens from pursuing claims against their own state in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The protections of the Eleventh Amendment exist unless the state has unequivocally consented to suit in federal court, or Congress has unequivocally abrogated state immunity in order to effectuate the provisions of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54-55 (1996); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because there is no dispute that the University is an "arm" of the State of Minnesota, the University is entitled to the protections of the Eleventh Amendment in a suit brought by citizens of Minnesota in a federal court. *See Treleven v. University of Minn.*, 73 F.3d 816, 819 (8th Cir. 1996).

Prior to the enactment of section 1367, the United States Supreme Court applied Eleventh Amendment immunity to claims brought in federal court under common law pendent jurisdiction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). In *Pennhurst*, the Court concluded that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." 465 U.S. at 121. Therefore, under the reasoning in *Pennhurst*, the

federal district court could not exercise jurisdiction over the MHRA claims once the Eleventh Amendment was asserted by the University. *See Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968 (8th Cir. 2000); *Mayer v. University of Minn.*, 940 F. Supp. 1474, 1476 (D. Minn. 1996). In fact, respondents did not dispute the University's motion in federal court to dismiss the MHRA claims, and the consolidated MHRA claims were dismissed.

Because respondents then filed the MHRA claim against the University in state district court after the 45-day statute of limitations set forth in Minn. Stat. § 363.14, subd. 1(a)(1) (2000) expired, we must decide if section 1367(d) can be applied to toll the statute of limitations on claims dismissed under an assertion of Eleventh Amendment immunity in federal court. The University argues that the Eleventh Amendment is an automatic jurisdictional bar preventing original and supplemental jurisdiction from ever attaching, thus preventing the application of tolling under section 1367(d). Respondents argue that the Eleventh Amendment is a waivable affirmative defense that permits supplemental jurisdiction to attach until immunity is successfully asserted, thereby allowing the statute of limitations to be tolled under section 1367(d) until the case is dismissed from federal court.

Underlying the parties' positions is a basic disagreement as to how the Eleventh Amendment operates as a jurisdictional defense. While we do not solve this dispute, we recognize that the Eleventh Amendment is a jurisdictional defense, but that it has unique characteristics not always shared with other limitations on federal jurisdiction. Indeed, the United States Supreme Court has long recognized Eleventh Amendment immunity as a limit on the reach of the federal judiciary. *See, e.g., Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III."); *Pennhurst*, 465 U.S. at 98 ("[T]he fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III * * *."); *Missouri v. Fiske*, 290 U.S. 18,

25 (1933) ("The Eleventh Amendment is an explicit limitation of the judicial power of the United States.").

Nonetheless, while recognizing the Eleventh Amendment as a constraint on the exercise of federal court jurisdiction, the Court has also consistently acknowledged two characteristics that distinguish Eleventh Amendment immunity from typical subject-matter jurisdiction limitations.[2] First, a party entitled to Eleventh Amendment protection may waive immunity and submit to federal court jurisdiction. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (stating that Eleventh Amendment immunity is a "personal privilege" that a state may waive). This differs from typical jurisdictional requirements, such as diversity jurisdiction, where the parties cannot confer jurisdiction by waiver or consent. *See Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court."). Second, a federal court is not required to raise an Eleventh Amendment defense *sua sponte*, whereas jurisdictional defects in general must be raised by the court if not addressed by the parties. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982) ("[B]ecause the State may, under certain circumstances, waive this [Eleventh Amendment] defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion"), *with Insurance Corp. of Ireland*, 456 U.S. at 702 ("[A] court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. ").

---

[2] Dicta in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391 (1998), indicates that whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is "a question [the Court has] not decided." More recently, however, the Court noted in *Kimel v. Florida Bd. of Regents* that "for over a century now, [the United States Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." 528 U.S. at 73.

Given these distinct characteristics, the court of appeals determined that when a state law claim asserted in federal court is subject to an Eleventh Amendment immunity defense, the federal court has jurisdiction over that claim until the state defendant successfully asserts the Eleventh Amendment and the claim is dismissed.[3] The University, on the other hand, argues that the Eleventh Amendment automatically bars federal court jurisdiction until immunity is waived. We need not answer this quintessentially federal question because, as explained below, our holding is not based on whether jurisdiction temporarily attaches. Rather, we must simply determine whether the Eleventh Amendment's proscription on Congress' power to extend federal judicial power over an unconsenting state allows Congress to impose tolling of a state statute of limitations for a claim against an unconsenting state defendant in state court. We conclude that application of the tolling provision violates the Eleventh Amendment, because the Eleventh Amendment prohibits Congress from extending the state's liability to suit in state court via the state's unconsented presence in federal court. Specifically, the Eleventh Amendment does not permit Congress to affect the liability of the University as to a state

---

[3] In support of the proposition that the Eleventh Amendment did not destroy original jurisdiction until it was successfully asserted by the University, the court of appeals also relied on the United States Supreme Court's statement in *Schacht*, that "[t]he Eleventh Amendment * * * does not automatically destroy original jurisdiction." 524 U.S. at 389. This reliance is misplaced because the issue before the Court in *Schacht* was whether the presence of a single claim barred by the Eleventh Amendment prohibited the federal court from exercising removal jurisdiction over any of the other claims. *See Schacht*, 524 U.S. at 385-86. Thus, *Schacht* informs us that when a cause of action consists of several claims with independent sources of federal jurisdiction, and one of those claims is barred by the Eleventh Amendment, the original jurisdiction is not destroyed for the remaining claims not subject to the Eleventh Amendment. *See Schacht*, 524 U.S. at 391. *Schacht* does not tell us whether the federal district court has jurisdiction over a claim barred by the Eleventh Amendment before sovereign immunity is asserted.

law claim in state court when the University did not consent to federal jurisdiction.

II.

The parties do not dispute that the Eleventh Amendment will bar a federal action against a state unless Congress has unequivocally abrogated the states' sovereign immunity in enacting legislation pursuant to section 5 of the Fourteenth Amendment or the state has waived its sovereign immunity. This principle is supported by Supreme Court case law. *See Seminole Tribe*, 517 U.S. at 55. Section 5 is an affirmative grant of power giving Congress the authority to "enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. Here, neither party contends that section 1367 effectuates a valid abrogation of state sovereign immunity.

Absent valid abrogation of the University's sovereign immunity through section 1367, the federal court could not exercise jurisdiction over the supplemental claims against the University without its consent. The University did not consent; instead, it asserted Eleventh Amendment immunity as an affirmative defense in its answer in the federal district court, and later as a basis for the motion to dismiss in federal court. As a result, the action was dismissed from the federal court system and the MHRA claims were subsequently filed in state district court.

The tentacles of section 1367 were not completely severed when the federal district court dismissed the supplemental claims, however. Allowing tolling under section 1367(d) would alter the University's position in state court by requiring the University to answer a claim in state court that would otherwise be barred by the state statute of limitations. Because Congress cannot, absent valid abrogation of sovereign immunity, extend federal judicial power against unconsenting states, it follows that Congress

cannot impose a penalty on a state defendant for being named, without its consent, as a defendant in federal court. To allow such a result would, in effect, penalize the unconsenting state defendant for the other party's failed attempt to sue the state in federal court. The Eleventh Amendment does not permit Congress to extend this federal judicial power over the states.

The constraints on federal power imposed by sovereign immunity are evident in decisions of the United States Supreme Court upholding assertions of sovereign immunity in contexts that fall outside the strict language of the Eleventh Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985) ("The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."). This expansive scope of sovereign immunity is apparent in *Alden v. Maine*, 527 U.S. 706, 711-12 (1999), in which a group of probation officers filed suit in federal district court against their employer, the State of Maine, alleging violations of the overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1994). After dismissal from the federal courts, the plaintiffs filed the same action in state court, as provided by the federal statute. *See Alden*, 527 U.S. at 712. The state court also dismissed the action on the basis of sovereign immunity. *See id.* Concluding that a federal statutory provision that purports to allow private actions against unconsenting states in their own courts is unconstitutional, the Court held that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by * * * legislation." *Id.* at 754. Therefore, absent consent, Congress could not make the State of Maine subject to suit in state court for violations of the federal Fair Labor Standards Act. *See Alden*, 527 U.S. at 754.

This case differs from *Alden* in that the contested claims here are not federal claims, but rather state law claims from which the University has no immunity in state court. *See* Minn. Stat. § 363.01, subds. 17, 28 (2000) (defining "employer" under the MHRA to include the state, its departments, agencies, and political subdivisions). However, we read *Alden* to require that the University's waiver of immunity be limited to the parameters set forth by state statute. 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."). Thus, as defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following respondents' notification of dismissal of charges by the Department of Human Rights. *See* Minn. Stat. § 363.14, subd. 1(a)(1).

Furthermore, the state's waiver of sovereign immunity for MHRA claims timely filed in state court does not diminish the University's Eleventh Amendment protections from *federal* judicial power with respect to MHRA claims. The University's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99. Therefore, the general waiver of immunity in state court is not a waiver of the University's Eleventh Amendment immunity in the federal courts. *See Pennhurst*, 465 U.S. at 99 n.9.

Through the federal tolling provision, respondents seek to expand the University's liability exposure by extending the time in which the MHRA claims can be filed in state court. Here, as in *Alden*, Congress has enacted legislation impacting an unconsenting state defendant's liability for suit in that state's own courts. The Eleventh Amendment does not allow this exercise of federal power over an unconsenting state. As the Court stated in *Alden*,

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States.

527 U.S. 758. Congress, through application of section 1367(d), does not treat the University as a sovereign entity. Based on the principles articulated in *Pennhurst* and *Alden*, we conclude that application of section 1367(d) to toll the statute of limitations applicable to state law claims against an unconsenting state defendant first filed in federal court but then dismissed and brought in state court is an impermissible denigration of the University's Eleventh Amendment immunity.

We also reject respondents' argument that tolling is required in the interests of judicial economy. Judicial economy and efficiency were central principles behind the Judicial Improvements Act of 1990, which included section 1367. *See* 136 Cong. Rec. S17580 (1990). However, in *Pennhurst*, the United States Supreme Court rejected the judicial economy argument in the context of applying the Eleventh Amendment to pendent state claims, concluding that "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." 465 U.S. at 123; *see also Fiske*, 290 U.S. at 25-26 ("Considerations of convenience open no avenue of escape from the [Eleventh Amendment's] restriction."). Similarly, we conclude that policy considerations cannot override Eleventh Amendment limitations on the authority of Congress to affect claims against the University in state court.

Extension of the University's exposure to suit in state court because a claim barred by the Eleventh Amendment has been filed against it in federal court is an infringement on the University's Eleventh Amendment immunity. Accordingly, we hold that section 1367(d) does not toll the state statute of limitations on the MHRA claims against the University.

III.

Even though section 1367(d) does not apply to toll the statute of limitations, the court of appeals held, in the alternative, that the limitations period should be tolled under equitable principles. It is within the discretion of the district court to grant or deny equitable relief. *See Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). The district court's decision will be reversed only upon a clear showing that such discretion has been abused. *See id.*

Respondents argue that equitable tolling is warranted because they elected to pursue their MHRA claims in federal court with the good faith belief that the federal court had jurisdiction over the claims. The district court acknowledged that at the time the federal actions were filed, there was some confusion surrounding the question of whether Eleventh Amendment immunity should apply to the federal Age Discrimination in Employment Act claim. The district court found, however, that under *Pennhurst* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims. Noting the limited scope of the equitable tolling remedy and failing to find any other grounds sufficient to invoke the remedy, the district court found that the respondents' election to pursue their MHRA claims in federal court did not justify equitable tolling.

In reversing the district court, the court of appeals did not discuss the district court's analysis or provide any reason to conclude that the district court abused its discretion. Our careful review of the record compels the conclusion that the

district court did not abuse its discretion when it denied respondents the remedy of equitable tolling.

Because section 1367 does not toll the state statute of limitations for the MHRA claim against the University and because the district court acted within its discretion in deciding that equitable tolling did not apply, we reverse the court of appeals and reinstate the district court's judgment that the claims were not timely filed.

Reversed.

PAGE, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN COURT OF APPEALS
C1-99-1140

Lance Raygor, et al.,
Appellants,

vs.

University of Minnesota,
a Minnesota State University,
Respondent.

Filed January 11, 2000
Reversed
Klaphake, Judge

Hennepin County District Court
File No. EM97013937

Howard Bolter, Borkon, Ramstead, Mariani & Letourneau, Ltd., 485 Northstar East, 608 Second Ave. S., Minneapolis, MN 55402-1959 (for appellants)

Andrew D. Parker, Matthew E. Johnson, Smith Parker, P.L.L.P., 808 Colwell Building, 123 North Third St., Minneapolis, MN 55401 (for respondent)

Considered and decided by Randall, Presiding Judge, Klaphake, Judge, and Holtan, Judge.*

---

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

1. The assertion of an Eleventh Amendment defense does not vitiate or destroy a federal district court's original jurisdiction over claims involving federal questions or the court's mandatory, supplemental jurisdiction over state law claims under 28 U.S.C. § 1367 (1994).

2. Under 28 U.S.C. § 1367(d) (1994), the limitations period for asserting claims under the Minnesota Human Rights Act is tolled during the pendency of a federal district court action alleging similar claims and claims under the Age Discrimination in Employment Act (ADEA), even though the federal district court action was ultimately dismissed on Eleventh Amendment grounds.

3. When the defendant is not prejudiced and when the plaintiff's decision to file an action including both federal and state claims first in federal district court was legally sound, the limitation period under state law may be equitably tolled pending a decision in federal district court.

OPINION

KLAPHAKE, Judge

Appellants Lance Raygor and James Goodchild brought this action against their employer, respondent University of Minnesota (University), alleging age discrimination in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.01-.20 (1996). The University moved to dismiss, arguing that the MHRA's 45-day statute of limitations had lapsed and was not tolled by 28 U.S.C. § 1367 (d) (1994). The district court agreed and granted the University's motion. We reverse.

FACTS

In August 1995, appellants filed separate charges with the Minnesota Department of Human Rights (MDHR) alleging age discrimination against the University. By letters dated July 17, 1996, the MDHR dismissed the charges and notified appellants that they had 45 days in which to file civil suits in state district court. *See* Minn. Stat. § 363.14, subd. 1 (1996) (person may bring civil action in state district court within 45 days after receipt of notice that commissioner has dismissed charge).

On August 30, 1996, appellants sued the University in federal district court. They each alleged one claim under the Age Discrimination in Employment Act of 1974 (ADEA) and one claim under the MHRA. Their actions were consolidated.

Nine months later, the University moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The University argued that the court lacked jurisdiction over the ADEA and the MHRA claims because the Eleventh Amendment bars suits in federal court against a state by citizens of that or another state. The federal district court granted the University's motion and dismissed appellants' claims without prejudice.

Appellants challenged the federal district court's decision in the Eighth Circuit Court of Appeals. That appeal has been stayed pending a decision by the United States Supreme Court in another case involving the issue of whether an ADEA claim against a state is barred by the Eleventh Amendment. *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

Twenty days after the federal district court dismissed their action, appellants brought this action in state district court alleging age discrimination under the MHRA. This action was stayed for several months pending a decision in the federal appeal. The state district court lifted the stay,

however, to allow the University to bring this motion to dismiss on statute of limitations grounds.

ISSUES

1. Did the district court err in concluding that the limitation period for appellants' state action was not tolled while appellants' federal action was pending?

2. Did the district court abuse its discretion by rejecting appellants' claim that the limitation period should be equitably tolled?

ANALYSIS

I.

Summary judgment is appropriate where no genuine issues of material fact exist and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. When the court examines documents and evidence in addition to the pleadings, a motion to dismiss under Minn. R. Civ. P. 12.02 becomes one for summary judgment. Minn. R. Civ. P. 12.03. Issues involving jurisdiction and application of statutes of limitations require statutory interpretation, which is a question of law that this court reviews de novo. *See Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 402 (Minn. 1996).

This case involves interpretation of the federal "Supplemental Jurisdiction" statute, which provides in pertinent part:

> (a) Except as provided in subsections (b) [which discusses diversity jurisdiction] and (c) [which allows court to decline to exercise supplemental jurisdiction in certain circumstances, such as when a state law claim raises a novel issue or when all original jurisdiction claims have been dismissed] * *

*, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. * * *.

****

(d) The period of limitations for any claim asserted under subsection (a) * * * shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367 (1994).

It is undisputed that the federal district court had original jurisdiction over appellants' ADEA claim, because that claim raised a federal question. *See* 28 U.S.C. § 1331 (1994) ("district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). In addition, the gravamen of both the ADEA and MHRA claims was discrimination based on age. Thus, the federal district court had mandatory, supplemental jurisdiction over appellants' MHRA claim, which was "so related to [the ADEA claims] that they form[ed] part of the same case or controversy" under 28 U.S.C. § 1367(a).

Nevertheless, the state district court in this case concluded that appellants' claims were not tolled under 28 U.S.C. § 1367(d). The court reasoned that because these claims were dismissed on Eleventh Amendment grounds, the federal district court never had "original" jurisdiction over them. Thus, the issue here is whether the Eleventh Amendment divested the federal district court of its original,

mandatory, and supplemental jurisdiction, such that jurisdiction never attached.

The Eleventh Amendment has been described as a "bar[] to federal court jurisdiction over a suit between an unconsenting State and one of its citizens." *Humenansky v. Regents of Univ. of Minn.*, 152 F.3d 822, 823-24 (8th Cir. 1998) (ADEA claim against University in federal court barred by Eleventh Amendment). The Eleventh Amendment, however, is not a typical jurisdictional limitation because it can be waived and because a federal court has discretion to raise it sua sponte. *Parella v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 55 (1st Cir. 1999). Although the Eleventh Amendment provides a state with an immunity defense, it does not necessarily destroy a federal district court's underlying jurisdiction:

> [B]ecause Eleventh Amendment immunity can be waived, the presence of an Eleventh Amendment issue does not threaten the court's underlying power to declare the law. If this were not the case, sua sponte consideration of a possible Eleventh Amendment bar would have to be obligatory, not discretionary - but the Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them.

Id. at 55-56 (citing *Wisconsin Dept of Corrections v. Schacht*, 118 S. Ct. 2047, 2052-53 (1998)).

In *Schacht*, the Supreme Court considered whether removal jurisdiction is destroyed when one of the removed claims is subject to an Eleventh Amendment bar. 118 S. Ct. at 2051. Similar to the federal question jurisdiction here, removal jurisdiction requires "original jurisdiction." 28 U.S.C. § 1441(a). The Supreme Court concluded that while the Eleventh Amendment may place a particular claim

beyond the power of the federal courts to decide, it does not destroy previously existing original jurisdiction. *Id.*, 118 S. Ct. at 2052-53. The Court further recognized- the distinction between diversity jurisdiction, which is automatically destroyed if one party is not diverse, and original jurisdiction, which is not destroyed even if the Eleventh Amendment is successfully asserted. *Id.* Thus, *Schacht* supports appellants' position that the Eleventh Amendment does not destroy or vitiate original jurisdiction until it is successfully asserted by a state or state entity.

The University argues that even if the federal district court had original jurisdiction over appellants' ADEA claim, 28 U.S.C. § 1367(d) does not toll the limitations period because appellants' state law MHRA claim was not dismissed by the federal district court for one of the reasons enumerated in 28 U.S.C. § 1367(c) (federal district court may "decline" to exercise supplemental jurisdiction in certain circumstances, including one in which claim raises complex issue of state law or court has dismissed all claims over which it has original jurisdiction). The University argues that because the federal district court was required to dismiss appellants' state law claim under the Eleventh Amendment, the court did not "decline" to exercise supplemental jurisdiction over that claim.

The University's argument is partially correct: MHRA claims are subject to the Eleventh Amendment. *See, e.g., Mayer v. University of Minn.*, 940 F. Supp. 1474, 1476 (D. Minn. 1996) (Eleventh Amendment bars federal court jurisdiction over state law claims under the MHRA, against unconsenting states or state officials) (citing *Pennhurst State Sch. Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984)). Thus, the federal district court in this case may have also dismissed appellants' MHRA claim under the Eleventh Amendment.

A close reading of 28 U.S.C. § 1367, however, establishes that the tolling provisions of subsection (d) apply

to "any" claim asserted under subsection (a), which discusses original and supplemental jurisdiction. Subsection (d) does not require a supplemental state law claim to be dismissed for a reason under subsection (c) in order for that claim to be tolled. Rather, subsection (d) expressly states:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d). Thus, the plain language of subsection (d) allows tolling of any claim dismissed by a federal district court, whether dismissed on Eleventh Amendment grounds or at the discretion of the federal district court under subsection (c).

Finally, at oral arguments before this court, counsel for the University repeatedly represented that "state law claims against a state can never be brought in federal district court" and that the "federal court never had subject matter jurisdiction over the state law claims," citing the Supreme Court's decision in *Pennhurst*. *Pennhurst* discusses a federal district court's "pendent" jurisdiction over state law claims and requires a federal court, once an Eleventh Amendment immunity defense is raised, to "examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst*, 465 U.S. at 121, 104 S. Ct. at 919. At no point, however, does the Supreme Court discuss "subject matter jurisdiction" or hold that the Eleventh Amendment destroys or vitiates subject matter jurisdiction over state law claims.

Moreover, *Pennhurst* was decided in 1984, prior to the 1990 enactment of 28 U.S.C. § 1367, which codified the case law doctrines of "pendent" and "ancillary" jurisdiction under the name of "supplemental" jurisdiction. *See* David F. Siegel, *Practice Commentary*, "The 1990 Adoption of § 1367, Codifying 'Supplemental' Jurisdiction," *reprinted in* 28 U.S.C.A. § 1367, at 829 (West 1993). Although *Pennhurst* remains good law, it must be read in conjunction with 28 U.S.C. § 1367 and with recent cases discussing the Eleventh Amendment, such as *Schacht*.

We therefore conclude that the district court erred in granting summary judgment to the University. Under 28 U.S.C. § 1367(d), the statute of limitations governing appellants' MHRA claim was tolled during the pendency of their federal district court action.

II.

Appellants alternatively argue that the limitation period should be equitably tolled under the facts of this case. The filing requirement of Minn. Stat. § 363.14 is subject to equitable tolling. *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. App. 1997). Factors to consider include prejudice to a defendant and the conduct of the plaintiff. *Id.* The burden is on appellants to prove they are entitled to equitable tolling. *See Bartlett v. Miller & Schroeder Muns, Inc.*, 355 N.W.2d 435, 441 (Minn. App. 1984).

There is little or no evidence that the University would be prejudiced if appellants' claims were equitably tolled. Appellants have asserted no new claims in this state district court action. Thus, any discovery the University has undertaken may be used here. Perhaps more importantly, the University could have notified appellants that it would not consent to suit in federal district court, thus allowing appellants time to file in state court; rather, the University waited nine months before asserting its Eleventh Amendment

defense. Any prejudice to either party was partly caused by the University's own actions.

With respect to appellants' conduct, the lack of clarity and clear precedent on the issues involved justifies equitable tolling. *See Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862 (9th Cir. 1995). We cannot fault appellants for failing to simultaneously file identical lawsuits in federal and state courts. At the time appellants brought their action in federal district court, federal law was unclear on whether a state was entitled to Eleventh Amendment immunity from ADEA claims. Indeed, federal circuits are split on this issue, and since the filing of appellants' lawsuit, the Eighth Circuit has taken a minority position and held that the Eleventh Amendment defense is available on ADEA claims against a state. *See Humenansky*, 152 F.3d at 825 n.2 (noting Eighth Circuit's disagreement with other circuits). Moreover, an appeal taken by appellants to the Eighth Circuit has been held in abeyance pending a decision by the Supreme Court in a case involving this same issue. *See Kimel*, 139 F.3d 1426. Finally, appellants could reasonable interpret 28 U.S.C. § 1367 as allowing tolling of their claims. Given the lack of clarity in this area, appellants' decision to file suit only in federal district court was legally sound and not based on their attorney's incorrect interpretation of the law. *Cf. Ochs*, 568 N.W.2d at 860 (equitable tolling not appropriate where plaintiff's choice of remedies based on attorney's incorrect interpretation of law).

We therefore conclude that even if appellants are not entitled to relief under 28 U.S.C. § 1367, their claims were equitably tolled during the pendency of their federal district court action.

DECISION

We reverse the district court's grant of summary judgment to the University. The University's assertion of an

Eleventh Amendment defense did not vitiate or destroy the federal district court's underlying original jurisdiction over appellants' ADEA claim or its mandatory, supplemental jurisdiction over appellants' MHRA claim. Thus, under 28 U.S.C. § 1367(d), the 45-day limitations period for asserting appellants' MHRA claim was tolled during the pendency of appellants' federal district court action.

Reversed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild

Plaintiffs,

v.

University of Minnesota, a Minnesota State University,

Defendant.

Court File No.: EM 97-013037

ORDER AND MEMORANDUM

The above-captioned matter came before the Court for a hearing on March 2, 199, on Defendants' Motion to Dismiss. Howard L. Bolter, Esq., appeared on behalf of Plaintiffs. Andrew D. Parker, Esq., appeared on behalf of Defendants.

Based upon all the files, records and proceedings herein and upon the arguments of counsel, **IT IS ORDERED THAT:**

1. Defendants' Motion to Dismiss is **GRANTED**.
2. The accompanying memorandum is incorporated herein by reference

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 5/28/99

/s/
Cara Lee Neville
Judge of District Court

MEMORANDUM

I. Facts

The facts relevant to this motion are not disputed. Plaintiffs in this age discrimination case are two former employees of the University of Minnesota. Following their alleged unlawful termination, Plaintiffs on August 23, 1995 filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). On July 17, 1996, the MDHR dismissed the charges of both Plaintiffs. Dismissal letters indicated that civil action may be brought in court within 45 days. Plaintiffs evidently received the letters on July 18, 1996. On or about August 30, 1996, Plaintiffs commenced separate actions against Defendants in the United States District Court, alleging violations of the federal Age Discrimination in Employment Act (ADEA) and the Minnesota Human Rights Act (MHRA). The two actions were subsequently consolidated. Thereafter, Defendants moved to dismiss based upon the Eleventh Amendment (sovereign immunity)[1], and on July 11, 1997 the motion was granted. In its order, the federal district court dismissed Plaintiffs' state law claims without prejudice.[2] Within 45 days of dismissal of their federal court action, Plaintiffs commenced the instant action, which contains a single count alleging violations of the MHRA. The instant action has been stayed pending the outcome of the federal court appeal, but the stay has been lifted for the limited purpose of hearing Defendants' present motion to dismiss.

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] Plaintiffs have appealed the decision to the 8th Circuit Court of Appeals. As of the date of this order, the appeal has not been decided.

II. Limitations Periods

This motion to dismiss presents a pure question of law concerning application of statutory and equitable tolling provisions to a statute of limitations. The MHRA requires that a person claiming unlawful employment discrimination first file a complaint with the MDHR as a precondition to suit. There is no dispute as to whether Plaintiffs did so within the required 180 days. The statute contains a second limitations period, allowing a claimant 45 days following receipt of a letter from the MDHR rejecting their claim (commonly known as a "right to sue" letter) in which to commence a civil court action. Failure to do so will render any subsequent suit untimely, resulting in dismissal upon motion by a defendant.

In the instant case, the Plaintiffs timely commenced their claims in federal court under the MHRA, invoking federal supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Their state court claims, however, were filed well outside the 45-day limitations period. The question then is whether the federal court action tolled application of the 45-day limitations period. (The state court action was filed less than 45 days after the federal court action was dismissed). In opposing the instant motion to dismiss, Plaintiffs raise two possible grounds for tolling, statutory and equitable. These will be addressed in turn.

III. Statutory Tolling

Plaintiffs bringing an action in federal district court premised on federal question jurisdiction may now assert connected state court claims under the federal court's supplemental jurisdiction. 28 U.S.C. § 1367(a) (1993). Under that section, supplemental jurisdiction applies "in any civil action of which the [federal] district courts have original jurisdiction". Id. Subsection (d) of the same statute contains

a provision tolling potential state court claims during their pendency in federal court, and for thirty days after their dismissal. 28 U.S.C. § 1367.[3] Defendants in moving to dismiss assert that the tolling provision does not apply, because Plaintiffs' ADEA claim does not qualify as one in which the federal court had "original jurisdiction".

The question presented on this motion appears to be one of first impression, namely whether dismissal of a federal law claim on Eleventh Amendment grounds means that the dismissing court never had "original" jurisdiction under 28 U.S.C. § 1367(a) for purposes of that statute's tolling provision. Plaintiffs in reliance on Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) assert that because the federal court in this case dismissed Plaintiffs' state law claims without prejudice, the tolling statute must apply. Franklin, however, is clearly distinguishable. Unlike the instant case, the plaintiff in Franklin brought a federal civil rights action and pendant state law claims against both the state and a state employee, the latter in his private as well as official capacity. The court's holding that the statutory tolling provision applied only applied to the non-state defendant. All claims against state defendants had been dismissed on immunity grounds, and were not the subject of this ruling. Moreover, the claim to which tolling applied had been dismissed for failure to state a claim rather than on grounds of immunity, as in the instant case.

Neither side has cited to any relevant legislative history, and no cases have been found on point. In cases involving dismissal of actions against state employees on the basis of qualified immunity, federal courts declining to exercise supplemental jurisdiction over remaining state law claims have commented that such claims are tolled pursuant to 28

[3] Tolling applies if "any claim asserted under subsection (a)" is dismissed. In the instant case, the Federal district court dismissed the pendant state law claims without prejudice.

U.S.C. § 1367(d). See, e.g., Sapp v. Cunningham, 347 F.Supp. 893 (D. Wyo. 1994) (dismissing § 1983 claims on basis of qualified immunity). However, in none of the cases reviewed did the court discuss whether original jurisdiction existed in the first instance.[4]

For the reasons stated more fully below, the Court concludes that the tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction". The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed Plaintiffs' state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

A Louisiana court recently addressed this issue for purposes of application of a state tolling statute. In Allo v. Horne, 636 So.2d 1048 (La. App. 1994), plaintiff bus driver brought a federal court action against a school board and various individuals, alleging breach of a various federal civil rights laws and pendant state law claims. The federal district court subsequently dismissed the federal law claims for failure to state a claim. The court then declined to accept jurisdiction over the remaining pendant state law claims, which it dismissed without prejudice for lack of subject matter jurisdiction. In a later-filed, co-extensive state court

[4] The failure of the courts to address this question perhaps owes to fundamental difference between Eleventh Amendment immunity, which applies to states, and qualified immunity, which applies derivatively to private individuals employed by states, acting under the color of state law. In the latter case the court properly exercises original jurisdiction because the individual has been sued qua individual. A second possibility is that the individual defendants simply have never raised this argument before.

action, defendants moved to dismiss based on statute of limitations (known as "prescription" in Louisiana). For purposes of applying the state's tolling law, the issue for determination was whether the federal court was a "court of competent jurisdiction" in the prior action. The defendants argued that tolling did not apply because the state claims, which plaintiff asserted in his state court action, had been dismissed by the federal court for lack of subject matter jurisdiction. The court disagreed, noting that one must look at the entire complaint to determine whether the federal court has jurisdiction in the first instance. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). Central to its ruling that the federal action tolled application of the limitations period, the court observed that the federal claims had been dismissed on the merits rather than for want of subject matter jurisdiction. Accordingly, the federal court was one of competent jurisdiction.[5]

The instant case is distinguishable from Allo because here both the state and federal claims were dismissed for lack of subject matter jurisdiction.[6] Based on the logic of Allo, the complaint to the district court herein was not a civil action of which the court had "original jurisdiction", and the tolling provision of 28 U.S.C. § 1367 does not apply.

---

[5] Nowhere in the decision did the court discuss the federal tolling statute under consideration in the instant case. The decision also contains no discussion of 11th Amendment immunity, which evidently was not raised as a defense in the federal court action.

[6] The court's opinion reads in full as follows:

> Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that: Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

Although this opinion does not describe the nature of the immunity defense, the basis for dismissal of all claims, federal and state, is Rule 12(b)(1), dismissal for lack of subject matter jurisdiction.

IV. Equitable Tolling

Equity permits a court to relieve a party from the preclusive effect of a statute of limitations in the furtherance of justice. As explained by the court in Bartlett v. Miller and Schroeder Municipals, Inc., 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (citation omitted), "Tolling principles are a creature of equity and the right to a tolling of the statute of limitations accrues only when the interests of justice require it." Prejudice to defendants is a valid consideration for purposes of this doctrine. Ochs v. Streater, Inc., 568 N.W.2d 858 (Minn. Ct. App. 1997). However, it has been held that equitable tolling is reserved for circumstances that are "truly beyond the control of the plaintiff." Shempert v. Harwick Chemical Corp., 151 F.3d 793, 797 (8th Cir. 1998) (holding that Title VII action not tolled where plaintiff failed to sign and return the Charge to the EEOC before the November 11th expiration of the filing period, despite the fact that she only received it in the mail on November 9th); Ochs, supra (employee was not entitled to equitable tolling of 45-day limitations period in which to bring age discrimination action, where employee offered no evidence that circumstances beyond his control prohibited him from serving complaint within statutory period).

In order for the doctrine to apply, a plaintiff must make a showing of excusable neglect, which may or may not be attributable to defendant. Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir.1998) (holding that actions taken by EEOC worker excused employee's late filing of Title VII charge). But see Arigo v. U.S., 980 F.2d 1159, 1162 (8th Cir. 1992) (citing Irwin v. Veterans Admin., 498 U.S. 89, ----, 111 S.Ct. 453, 458 (1990)) (equitable tolling does not extend to "garden variety cases involving excusable neglect"). However, "innocent inadvertence" will not toll the statute same immunity defense raised by the Defendants. There was

no binding authority in the Eighth Circuit, which had not yet passed on this question.[7]

The fatal flaw in Plaintiffs' argument is that there was no lack of clarity as to whether they could pursue supplemental state law claims. This is to say that even had the court concluded that it could hear Plaintiffs' federal law (ADEA) claim against Defendants, the court would have had to dismiss their state law (MHRA) claims for lack of jurisdiction, supplemental or otherwise. See Lembach v. State of Indiana, 987 F.Supp. 1095 (N.D. Ind. 1997.) (11th Amendment bars damages claims against state, and court cannot assert supplemental jurisdiction over claims otherwise barred by the 11th Amendment); Doran By and Through Doran v. Condon, 983 F.Supp. 886, 891 (D. Neb. 1997) (dismissing state from suit entirely "[b]ecause Plaintiffs' only claims against the defendant State of Nebraska are state-law tort claims"). Indeed, in none of the seven cases from other circuits cited by Plaintiffs for the proposition that a state defendant may be subject to suit in federal court under ADEA did the plaintiff even assert supplemental or pendant state-law claims against the state defendants. At the time Plaintiffs brought their federal court action, it was (and remains) settled law that the federal courts lacked matter jurisdiction to hear these supplemental claims, irrespective of whether the ADEA action could be maintained. See Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900, 907, 465 U.S. 39 (1984) (states are immune from suit in federal court for violations of state law).

Defendants cites Ochs, supra, for the proposition that an attorney's erroneous interpretation of a statute of limitations

[7] Complicating matters is the fact that the court in which the action was brought previously ruled that federal courts do not have jurisdiction over federal discrimination claims asserted against states. Humenansky v. Regents of Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997). However, the 8th Circuit's decision affirming that ruling appears to have been rendered after Plaintiffs commenced their federal court action.

will not warrant equitable tolling. Although Ochs is distinguishable,[8] another case cited by Defendants, Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976) is dispositive. In Bonhiver, the Court concluded that "the commencement of an action in a federal district court which lacks jurisdiction does not toll the statute of limitations". The parties in that case arguing for estoppel originally were putative class members in a federal class action suit. Said plaintiffs, however, failed to meet the $10,000 jurisdictional minimum, depriving the federal court of jurisdiction to hear their claims. Accordingly, there could be no tolling of the statute of limitations to allow their intervention in a subsequent state court action, which was filed after the statute of limitations had run on the claims.

Plaintiffs attempt to distinguish Bonhiver, asserting that the federal district court initially had federal question jurisdiction over their ADEA claim and supplemental jurisdiction over their MHRA claim, and that federal jurisdiction was dislodged only after Defendants prevailed on their immunity defense. Plaintiffs in so arguing creates a distinction without a difference. As applied to the facts of this case, sovereign immunity is identical to the absence of subject matter jurisdiction, functionally and as a matter of definition.

That a party might raise sovereign immunity based on the Eleventh Amendment as an "affirmative defense" does not presuppose that the court had jurisdiction over the matter in

[8] The court's rejection of plaintiff's limitations argument in Ochs was not part of its analysis of equitable tolling at all. Rather, the ambiguity argument was part of a question of statutory construction. In that case, counsel attempted to create ambiguity in the law where none existed in order to avoid dismissal based upon the statute of limitations. In the court's word, counsel "contrive[d] a series of arguments to revive his claim." Id. at 859. Specifically, counsel argued that the words "bring an action" must mean something other than "commence an action", because a separate statute calls for the chapter's provisions to be liberally construed. The court disagreed, holding that to "bring" unambiguously meant to "commence".

the first place.[9] Sovereign immunity is an inherent recognition that a court lacks jurisdiction. As noted by the Justice Powell, "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst, 104 S.Ct. at 907. He went on to describe the Eleventh Amendment as an "explicit limitation on federal jurisdiction". Id. at 917. See also Moore v. State of Indiana, 999 F.2d 1125, 1129 (7th Cir.1993) (11th Amendment operates to divest the court of subject matter jurisdiction). The historic basis for this view has been described as follows: "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution." Spanel v. Mounds View School District No. 621, 118 N.W.2d 795, 800, 264 Minn. 279 (1962) (quoting Justice Traynor) (emphasis supplied).

An exception arises in rare cases involving the application of a sovereign immunity defense to a situation involving concurrent jurisdiction, also known as dual sovereignty. In Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996), a non-Indian employee of a tribe-owed business brought a civil action in state district court on state law claims arising from her employment. The court explained the immunity issue as follows:

> At the heart of this case is the issue of whether tribal business entities are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts--jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit.[10]

Gavle, 555 N.W.2d at 288. In Gavle, the court specifically ruled that it had jurisdiction to hear such claims, even though they arose in part within the jurisdictional boundaries of a sovereign nation. Nonetheless, the court went on to hold that the tribal corporation was entitled to sovereign immunity and, accordingly, dismissal of plaintiff's action. Concurrent jurisdiction in that case was premised on the special constitutional status of Native Americans and other historical considerations, which on the facts of Gavle permitted the state to share in jurisdiction over the case. These factors are absent in the present case, insofar as federal courts lack jurisdiction to hear actions against states altogether. See Pennhurst, 104 S.Ct. at 918 ("[the Eleventh] Amendment thus is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts"). Without more, lack of prejudice to a defendant is insufficient grounds to invoke equitable tolling. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 1726 (1984) (absence of prejudice is "not an independent basis for invoking the doctrine" of equitable tolling). Plaintiffs have not met the requirements for equitable tolling, and therefore, Defendants' motion to dismiss must be granted.

---

[9] In point of fact, Defendant to the instant case prevailed in the federal district court action on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

[10] The Minnesota Supreme Court's classification of immunity as an "affirmative defense" rather than a jurisdictional bar makes sense only in the content of concurrent jurisdiction. See discussion above. In this light, it is significant to note that the Court chose its words carefully, describing tribal sovereign immunity as an affirmative defense.

V. Conclusion

For the reasons set forth in this memorandum, Defendants' Motion to Dismiss is granted. Neither statutory tolling nor equitable tolling applies, and therefore Plaintiffs' suit is untimely.

C.L.N.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-96-CV-862
4-96-CV-863

Lance Raygor	)	
	)	
v.	)	
	)	
University of Minnesota	)	
	)	ORDER
James Goodchild	)	
	)	
v.	)	
	)	
University of Minnesota	)	

Defendant moves to dismiss, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that:

Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 11th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild Plaintiffs, v. University of Minnesota, a Minnesota State University, Defendant.	)	Case No. EM 97-013037 **AFFIDAVIT OF MATTHEW E. JOHNSON**

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Matthew E. Johnson, being first duly sworn, states as follows:

1. I am licensed to practice law in the State of Minnesota. I am one of the attorneys representing the Defendant in this action, the University of Minnesota.

2. Attached as **Exhibit 1** is a true and correct copy of an August 23, 1995, letter from the Minnesota Department of Human Rights to the University of Minnesota concerning Charge No. ER19951221, which was filed with the Department by Lance Raygor.

3. Attached as **Exhibit 2** is a true and correct copy of an August 23, 1995, letter from the Minnesota Department of Human Rights to the University of Minnesota concerning

Charge No. ER19951220, which was filed with the Department by James Goodchild.

4. Attached as **Exhibit 3** is a true and correct copy of a July 17, 1996, letter from the Minnesota Department of Human Rights stating that the Department has dismissed Charge No. ER19951221 and that Mr. Raygor may bring a civil action within 45 days of his receipt of the letter.

5. Attached as **Exhibit 4** is a true and correct copy of a July 17, 1996, letter from the Minnesota Department of Human Rights stating that the Department has dismissed Charge No. ER19951220 and that Mr. Goodchild may bring a civil action within 45 days of his receipt of the letter.

6. Attached as **Exhibit 5** is a true and correct copy of a Complaint filed by Lance Raygor against University of Minnesota in the United States District Court for the District of Minnesota, dated August 29, 1996.

7. Attached as **Exhibit 6** is a true and correct copy of a Complaint filed by James Goodchild against University of Minnesota in the United States District Court for the District of Minnesota, dated August 29, 1996.

8. Attached as **Exhibit 7** is a true and correct copy of an Order that was filed May 6, 1997, assigning Mr. Raygor's action, No. 4-96-CV-862, and Mr. Goodchild's action, No. 4-96-CV-863, to the same judge so that they may be considered together.

9. Attached as **Exhibit 8** is a true and correct copy of Defendant's Memorandum of Law in Support of its Motion to Dismiss, dated June 3, 1997, in the consolidated actions of Raygor v. University of Minnesota, No. 4-96-CV-862 (D. Minn.), and Goodchild v. University of Minnesota, No. 4-96-CV-863 (D. Minn.).

10. Attached as **Exhibit 9** is a true and correct copy of a July 11, 1997, Order granting Defendants Motion to Dismiss in the consolidated actions of Raygor v. University of Minnesota, No. 4-96-CV-862 (D. Minn.), and Goodchild v. University of Minnesota, No. 4-96-CV-863 (D. Minn.). One

day before the hearing on the University's motion. Judge James M. Rosenbaum initiated a conference call with Howard L. Bolter, counsel for Plaintiffs, and me. Judge Rosenbaum informed us that there was no need for a hearing on the motion because, upon reviewing the motion papers, he had decided to grant Defendant's motion for the reasons stated in Humenansky v. Board of Regents of the Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997).

11. Attached as **Exhibit 10** is a true and correct copy of a Notice of Appeal filed jointly by Mr. Raygor and Mr. Goodchild in the United States District Court for the District of Minnesota on or about August 6, 1997. This appeal still is pending at the United States Court of Appeals for the Eighth Circuit.

12. Attached as **Exhibit 11** is a true and correct copy of the Complaint, dated July 30, 1997, in the present action.

13. Attached as **Exhibit 12** is a true and correct copy of an October 29, 1997, Order in the present action.

14. Attached as **Exhibit 13** is a true and correct copy of a December 31, 1998, Order in the present action.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/
Matthew E. Johnson

Subscribed and sworn to before me
this ____ day of _____, 1999.

_____
Notary Public

Minnesota Department of Human Rights

Aug. 23, 1995

REF: ER19951221
Lance Raygor
vs.
University of Minnesota

Dr Nils Hasselmo President
University of Minnesota
202 Morrill Hall
101 Church Street S.E.
Mpls, MN 55455-

Dear Dr Nils Hasselmo:

The Minnesota Department of Human Rights has received a charge alleging that an unfair discriminatory practice has been committed in violation of the Minnesota Human Rights Act, Minn. Stat., Chapter 363. Acceptance of a charge by the Department does not mean that a decision has been made that a violation of the law has occurred.

Since the Charging Party filed earlier with the Equal Employment Opportunity Commission, that agency will address the concerns raised by the Charging Party.

The Minnesota Department of Human Rights will accept the EEOC's final finding or resolution of the charge and accept it as its own unless a party to the charge requests the Department to conduct a review of the EEOC's final action. To exercise this right, you must submit your request for review in writing to this office at the above address within 10 working days of the date on which you receive the EEOC's notice of its final finding or resolution. Should the EEOC establish that it lacks jurisdiction, the Department may assume jurisdiction to

further process the charge without a Charging Party request. However, claims of disability discrimination which are eligible for remedy under the Minnesota Workers' Compensation Act are not jurisdictional to the Department and cannot be accepted by this agency for review, processing, or issuance of a decision. Karst v. F.C. Hayer Co., Inc., 447 N.W.2d 180 (Minn. 1989).

You should be informed the Charging Party has the right to bring a civil suit in state district court 45 days after the filing of his charge: this right commences on Sep. 21, 1995.

Questions concerning this notice or your right to request review should be directed to the Department at (612) 296-9061.

Sincerely,

/s/
David Beaulieu
Commissioner

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974: See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC — CHARGE NUMBER: 265951267

Minnesota Department of Human Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Mr. Lance Raygor — HOME TELEPHONE (Include Area Code): (612) 784-0385

STREET ADDRESS: 2584 Moundsview Drive, Moundsview, MN 55112 — CITY, STATE AND ZIP CODE — DATE OF BIRTH: 12/29/41

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: University of Minnesota — NUMBER OF EMPLOYEES, MEMBERS: over 100 — TELEPHONE (Include Area Code): (612) 625-5000

STREET ADDRESS: 100 Church St. SE, Minneapolis, MN 55455 — CITY, STATE AND ZIP CODE — COUNTY: Henn.

NAME — TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS — CITY, STATE AND ZIP CODE — COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE: EARLIEST 12/14/94 LATEST /, /
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I. I am a 53 year old male and have been working for the respondent for approximately 29 years. I have been a Senior Broadcast Technician for 9 years. On December 2, 1994, I was offered a Rule of 75/early retirement program for the stated reason being my age and high wage. On and after December 12, 1994, when I rejected the offer of Rule of 75/early retirement, I had my job duties reassigned, different job duties were assigned to me and I was assigned weekends and night hours. In short, the respondent stated they were to reclassify me to a Broadcast Technician, which would result in a demotion in job duties and a significant reduction in my pay. Such conduct is ongoing to the present date.

II. Respondent's reason for adverse action is: I am no longer qualified for the position of Senior Broadcast Technician.

III. Respondent's adverse action is age discrimination in violation of the Age Discrimination in Employment Act.

I want this charge filed with both the EEOC and the State or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

HOWARD L. SOLTER
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan 31 1998

Date — Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Lance D. Raygor

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 7/15/95

BEST AVAILABLE COPY

Minnesota Department of Human Rights

July 17, 1996

REF: ER19951221

Lance Raygor
2584 Moundsview Drive
Moundsview, MN 55112

vs.

University of Minnesota
202 Murrill Hall - 101 Church Street S.E.
Minneapolis, MN 55455

This letter is to inform you of the action taken by this agency on the above-referenced charge which was processed by the Equal Employment Opportunity Commission (EEOC) and referred to this agency for filing purposes only.

As part of the work-sharing agreement between EEOC and this agency, EEOC has notified us that they have closed their file in this matter. The Minnesota Department of Human Rights has therefore dismissed its file accordingly.

Please be informed that the Charging Party may be able to bring a civil suit in state district court within 45 days of receipt of this letter pursuant to Minnesota Statutes 363.14.

If you have any questions about this matter, please contact Karen Ferguson at (612) 296-9061.

Sincerely,

/s/
David Beaulieu

Commissioner

DB/dmrz

CP-RP

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lance Raygor	)	
	)	
v.	)	4-96-CV-862
	)	
University of Minnesota	)	

James Goodchild	)	
	)	
v.	)	4-96-CV-863
	)	
University of Minnesota	)	

ORDER FOR REASSIGNMENT OF RELATED CASES

Case No. 4-96-CV-862, having been assigned to the Honorable James M. Rosenbaum, United States District Judge, and Case No. 496-CV-853, having later been assigned to the Honorable David S. Doty, United States District Judge, and said matters being related cases, IT IS ORDERED that:

1. Case No. 4-96-CV-863 be assigned to Judge Rosenbaum, nunc pro tunc, by use of a card on the civil rights list of the automated case assignment system, and the Clerk of Court shall void and reuse a card on the same list, pursuant to this Court's Assignment of Cases Order, dated February 5, 1993.

2. A copy of this Order shall be filed in each case.

Dated: April 30th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

Dated: May 5, 1997

/s/
DAVID S. DOTY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-96-CV-862
4-96-CV-863

Lance Raygor)
)
v.)
)
University of Minnesota)
) ORDER
)
James Goodchild)
)
v.)
)
University of Minnesota)

Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that:

Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

LET JUDGMENT ENTERED ACCORDINGLY.

Dated: July 11th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lance Raygor,

Plaintiff,

v. Case No. 4-96-CV-862/JMR/FLN

University of Minnesota,
a Minnesota state university,

Defendant.

NOTICE OF APPEAL

James Goodchild,

Plaintiff,

v. Case No. 4-96-CV-863/JMR/FLN

University of Minnesota,
a Minnesota state university,

Defendant.

Notice is hereby given that James Goodchild and Lance Raygor, Plaintiffs in the above entitled matter, hereby appeal to the United States Court of Appeals for the Eighth Circuit from Final Judgment entered in this action on the 14th day of July, 1997.

Dated: 8/6/97

BORKON, RAMSTEAD, MARIANI & LETOURNEAU, LTD.

By /s/
Howard L. Bolter - 192387
Attorney for Plaintiffs
485 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-7155

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild,

Plaintiffs,

97-13037

vs.

ORDER

University of Minnesota, a Minnesota State University,

Defendant.

The above-entitled matter came on for hearing before the Honorable Cara Lee Neville, Judge of Hennepin County District Court, on October 29, 1997. Howard Bolter, Esq. appeared on behalf of Plaintiff. Andrew Parker, Esq. appeared on behalf of Defendant.

Based upon all records, files and proceedings herein, the arguments of counsel, and the Court being fully advised in the matter, IT IS HEREBY ORDERED:

1. That Defendants' Motion to Stay Proceedings is **GRANTED**;

2. That this action shall be stayed until final judgment is entered in the consolidated appeal of Lance Raygor v. University of Minnesota and James Goodchild v. University of Minnesota, No. 97-3210 (8th. Cir. 1997); and

3. That this stay shall not affect the parties' presently existing procedural and substantive rights.

DATED: 10/29/97

BY THE COURT:

/s/
Cara Lee Neville
Judge of District Court

cc: Howard Bolter, Esq.
Andrew Parker, Esq.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild,

Plaintiffs,

vs. ORDER LIFTING STAY

University of Minnesota, File No. EM 97-13037

Defendant.

The above matter came before the undersigned, Judge of District Court, on December 17, 1998, upon plaintiff's renewed motion to lift the stay in the above matter which was ordered on October 29, 1997.

Howard L. Bolter, Esq., appeared on behalf of the plaintiffs and moving party. Andrew D. Parker, Esq., appeared on behalf of the defendant.

IT IS HEREBY ORDERED that the stay ordered on October 29, 1997 shall be lifted for the limited purpose of the Statute of Limitations issue on summary judgment motion.

Dated: December 31, 1998

BY THE COURT:

/s/
Cara Lee Neville
Judge of District Court